IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Isojiro Kitagawa, *Appellant,* *vs.* Oliver T. Shipman, Treasurer of the County of Hawaii, and County of Hawaii, *Appellees.*	No. 6454
Mana Transportation Company, Limited, an Hawaiian corporation, *Appellant,* *vs.* Oliver T. Shipman, Treasurer of the County of Hawaii, and County of Hawaii, *Appellees.*	No. 6455

Upon Appeals From the Supreme Court of the Territory of Hawaii.

APPELLANTS' BRIEF.

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STATEMENT OF CASE.

Upon stipulation of counsel this Honorable Court has consolidated the two above-entitled cases, to be briefed and argued as one case. The two cases were similarly consolidated in the Supreme Court of the Territory of

Hawaii, from which court this appeal is taken, and differ only in minor respects hereinafter more particularly set forth. This brief will be chiefly devoted to the Kitagawa case and reference will be made to the Mana Transportation Company case only when necessary to call attention to the differences which exist between them.

On March 28, 1930, and July 2, 1930, Bills of Complaint in equity were filed by the complainants Isojiro Kitagawa and The Mana Transportation Company, Limited, respectively, in the Circuit Court of the Fourth Circuit, Territory of Hawaii, whereby said complainants sought to enjoin the enforcement of section 1306, Revised Laws 1925 of the Territory of Hawaii, as amended, a statute imposing a tax upon all motor vehicles in the Territory of Hawaii at the rate of one cent for each pound in weight of such motor vehicles.

The Bill of Complaint in the Kitagawa case, as amended by leave of court, alleges that complainant is an automobile dealer and owns, as part of his stock in trade, eighteen second-hand motor vehicles; that these eighteen second-hand motor vehicles are deposited in his stock and sales room and are not used upon the public highways nor intended to be used upon the public highways during the year 1930; that the legislature of the Territory of Hawaii has duly enacted section 1306 of the Revised Laws of the Territory of Hawaii 1925 and subsequent amendments thereto, under and by virtue of which there is payable to the treasurer of the County of Hawaii by the complainant the sum of three hundred thirty-eight dollars ($338.00); that complainant has refused to pay said sum on the ground that the tax is illegal; that the respondent Oliver T. Shipman, treasurer of the

County of Hawaii, has publicly announced that the County of Hawaii is entitled to the payment of the weight tax on every motor vehicle in said county, however owned or used, and that he has threatened to seize all motor vehicles upon which said tax has not been paid; and that unless restrained by injunction, he will seize and sell complainant's motor vehicles as provided by said statute.

The Bill of Complaint then sets forth that said statute is unconstitutional for the reason that it attempts to assess a propery tax without reference to value and imposes, in the case of each of complainant's vehicles, a tax which is arbitrary and entirely disproportionate to the real value of the vehicle, whereby complainant will be required to pay a larger tax than other car owners and dealers whose motor vehicles are of the same value; that if complainant is forced to pay said tax he will be deprived of the equal protection of the laws and his property will be taken without due process of law, contrary to his rights as guaranteed to him by amendments V and XIV of the Federal Constitution.

The remaining portions of the amended Bill of Complaint set out the equitable jurisdiction of the court by alleging that complainant will suffer great and irreparable loss and injury if his motor vehicles are taken from him and sold at public auction as provided by said statute, because of the fact that a forced sale under such circumstances will cause said vehicles to be sold for only a small part of their true value; that prospective purchasers of the automobiles of the complainant have been fully advised as to the terms of the said statute and the threat of seizure on the part of the respondent treasurer and

are thereby deterred from purchasing said motor vehicles, as a result of which complainant will suffer a damage by reason of loss of sales and depreciation in value of said motor vehicles which cannot be fixed in terms of money value; that because of the strictness of the rules of the common law complainant is entirely remediless unless he shall have relief in equity.

The Bill of Complaint in the Mana Transportation Company case differs only in that it is alleged that complainant in that case is the owner of twenty motor trucks and is operating the same upon the public highways of the Territory of Hawaii.

The respondents demurred to the amended Bill of Complaint in the Kitagawa case on the grounds: (1) that it does not state facts sufficient to entitle complainant to the relief prayed for; (2) that complainant is not entitled to equitable relief for the reason that he has a complete and adequate remedy at law. The court sustained the demurrer on both grounds.

Appeals were taken from the decrees sustaining respondents' demurrers and dismissing complainants' Bills of Complaint, to the Supreme Court of the Territory of Hawaii. On December 30, 1930, the opinion of the Supreme Court was filed, in which two of the justices upheld the automobile weight tax on the ground that it imposed an excise tax upon the use of the public highways. Parsons, J., concurred in the conclusion that said tax was constitutional but was of the opinion that it was a property rather than an excise tax.

This appeal is taken under J. C. section 238, paragraph 4, as amended by Act of February 13, 1925.

Specification of Errors.

The Assignments of Error in the Kitagawa case are set forth in transcript of record No. 6454, pp. 61-67, and those in the Mana Transportation Company case are set out in transcript of record No. 6455, pp. 22-27. As the errors assigned in the latter case are identical with those in the former, with the exception of the omission of paragraphs 12 and 17, reference will be made in the following specification of errors to the Assignments of Error in the Kitagawa case only.

(1) The court erred in holding that section 1306 of the Revised Laws of Hawaii, 1925, as amended by Act 180 of Session Laws of Hawaii, 1925, and by Acts 33, 172 and 246 of the Session Laws of Hawaii, 1927, did not impose a property tax. (Assignments of Error Nos. 10, 14, 9 and 11.)

(2) The court erred in assuming that all "power driven vehicles," within the meaning of section 1306 of the Revised Laws of Hawaii, 1925, as amended by Act 180 of Session Laws of Hawaii, 1925, and by Acts 33, 172 and 246 of the Session Laws of Hawaii, 1927, would be used upon the public highways within a particular tax period. (Assignments of Error Nos. 15, 16, 13, 12 and 17.)

(3) The court erred in holding that section 1306 of the Revised Laws of Hawaii, 1925, as amended by Act 180 of Session Laws of Hawaii, 1925, and by Acts 33, 172 and 246 of the Session Laws of Hawaii, 1927, imposing a property tax levied according to a scheme of classification bearing no relation to value, does not deprive com-

plainants of property without due process of law or deny them the equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments of the Constitution of the United States. (Assignments of Error Nos. 7, 8, 1, 2, 3 and 4.)

(4) The court erred in holding that section 1306 of the Revised Laws of Hawaii, 1925, as amended by Act 180 of Session Laws of Hawaii, 1925, and by Acts 33, 172 and 246 of the Session Laws of Hawaii, 1927, imposing an excise tax graduated according to weight upon automobiles not using the public highways of the Territory of Hawaii, nor intended to be used upon such highways, for the privilege of using such highways, does not deprive complainants of property without due process of law or deny them the equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments of the Constitution of the United States. (Assignments of Error Nos. 3, 4, 5 and 6.)

(5) The court erred in holding that a court of equity is without jurisdiction in the above-entitled causes. (Assignments of Error Nos. 20, 21 and 22.)

(6) The court erred in affirming the decree of the trial court. (Assignments of Error Nos. 18 and 19.)

ARGUMENT.

I.

Introduction.

In many, if not all of the states of the Union, and in the territories as well, the regulation and taxation of motor vehicles has been an important concern of legislative bodies. Many jurisdictions have imposed taxes *upon the use of the public highways by motor vehicles,* the proceeds of which have been appropriated for the construction, maintenance and repair of such highways; and in imposing such taxes the legislatures have been repeatedly upheld in their power to classify motor vehicles by weight, horsepower, or any other standard bearing a reasonable relation to the destructibility of the public highways by such motor vehicles. However, the automobile weight tax imposed by section 1306, R. L. 1925 of the Territory of Hawaii, presents a unique departure from the precedents established in other jurisdictions. Here the tax is imposed, not upon the use of the public highways by motor vehicles, but *upon all motor vehicles within the territory,* regardless of whether used upon private or public roads or whether used at all during the taxable period.

The very prevalence of legislation taxing automobiles for the maintenance of highways makes it of great importance that the constitutional limitations upon the power to tax be carefully observed and that legislative bodies, in their zeal for the enactment of beneficial legislation, be limited within the bounds of the due process and equal protection clauses of the Federal Constitution. It is the contention of appellants that the tax here involved differs

from all others imposed in other jurisdictions in that it is a property tax upon the ownership of motor vehicles rather than an excise tax upon their use of the public streets and highways, and that it is invalid as a property tax in that it is measured in a manner having no relation to the value of the property taxed. That it *is* a property tax is shown by numerous decisions defining the essential difference between property and excise taxes, by the history of legislative enactments on the subject by the Territorial legislature, and by the interpretation placed upon the act itself by the Supreme Court of the Territory of Hawaii.

II.

The Tax Here Imposed Is a Property Tax and Not an Excise.

Section 1306, R. L. 1925, as amended by Act 180 S. L. 1925, and by Acts 33, 172 and 246, S. L. 1927, provides:

> "All automobiles and other power driven vehicles (all such vehicles being hereinafter referred to as motor vehicles) shall be subject to an annual tax of one cent for each pound in weight of such motor vehicles, to be paid by the owners thereof, which tax shall be collected by the treasurer or his deputy, of the county or city and county, as the case may be, and shall become due and payable on the first day of January and must be paid before the first day of March in each year. In determining the amount of tax for motor vehicles, the weight taken shall be that of such motor vehicles when in ordinary use and with all its accessories and fittings, including fuel and water."

Partial exemptions are provided in favor of cars bought after January first of each year, vehicles brought into the territory for temporary use by non-residents and new vehicles in stock for purposes of sale. The section further provides:

> "Upon receipt of such tax the treasurer or his deputy shall number and register such motor vehicles in the owner's name in a permanent record or book to be kept by him for this purpose, and shall furnish the owner thereof with a receipt which shall show upon its face the license number of such motor vehicle, and shall state the fact that the tax has been paid thereon for the whole or the remainder of the current year in which the receipt is issued. The treasurer or his deputy shall also furnish the owner with two number plates for such motor vehicle with the number and year marked thereon, charging therefor in addition to the tax the sum of one dollar. The owner shall attach such number plates to such motor vehicle, one on the front and the other on the rear thereof, which number plates shall be securely fastened to the motor vehicle in such a way as to prevent such number plates from swinging and at a minimum of sixteen inches from the ground. All such number plates shall be so placed that they shall be plainly visible. * * * Any motor vehicle not having the number plates required by this section, or any motor vehicle upon which taxes are delinquent as hereinbefore provided, may be seized wherever found by the treasurer, his deputy or by any sheriff."

Provision is also made for the sale of all vehicles seized and not redeemed within a time specified.

The essential classification of taxes which must determine the validity of the tax here imposed is well set out in 26 Ruling Case Law, at pages 34-35, as follows:

> "Taxes fall naturally into three classes, namely, capitation or poll taxes, taxes on property, and excises. Capitation or poll taxes are taxes of a fixed amount upon all the persons, or upon all the persons of a certain class, resident within a specified territory, without regard to their property or the occupations in which they may be engaged. Taxes on property are taxes assessed on all property or on all property of a certain class located within a certain territory on a specified date in proportion to its value, or in accordance with some other reasonable method of apportionment, the obligation to pay which is absolute and unavoidable and is not based upon any voluntary action of the person assessed.
>
> Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of the government. The word has however come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authorities for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation. The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise and the element of absolute and unavoidable demand is lacking."

It is often very important to determine whether a certain tax is a property tax or an excise. Excise taxes are

governed by many rules entirely different from those which control property taxation and do not fall within certain constitutional requirements which apply to property taxes, such as those requiring taxation of property by value. In this connection it has frequently been observed, as in the above quotation, that the essential distinguishing feature is that "the obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking." A casual reading of the act here involved will disclose that it imposes a tax on *all* motor vehicles within the territory. On the large plantations of the Territory of Hawaii are many motor vehicles whose use is confined to private roads constructed by the owners thereof and which are never used beyond the confines and limits of those plantations. These motor vehicles are taxed under the act. On many used car lots, such as those of the appellant Kitagawa, are to be found motor vehicles which will never, within a particular taxable year, see use on the public highways or any use whatsoever. These motor vehicles are also subjected to the tax imposed by the act. It is inconceivable that any motor vehicle in the territory not specifically exempted would escape the tax; the element of absolute and unavoidable demand, which is lacking in an excise, is here most certainly present. It is obvious that the tax is not imposed upon the use of the public highways for the maintenance of which its proceeds are intended. If an excise tax is, under the above definition, a tax imposed upon the exercise of a privilege, the tax here in question can be viewed as an excise only in the

sense that it is *an assessment against the exercise of the privilege of ownership.*

It is now well established that the exercise of the privilege of ownership cannot be made the subject of excise taxation. The decisions of the United States Supreme Court and of the highest courts in many states, as well as the texts of all treatises on the subject, support this rule. No authority can be cited to the contrary. In Cooley on Taxation, 4th Ed., Vol. 4, at pp. 3382-3, the learned author discusses the rule as follows:

> "A tax levied by reason of ownership of property is said to be a tax on property rather than an occupation tax, and it is also held that a tax on the right of ownership of a thing is a tax on the thing itself. The mere right to own or hold property cannot be made the subject of excise taxation. An imposition in the form of an excise cannot be upheld as such where it is really an indirect method of levying a property tax. For instance, it is held in Mississippi that a statute imposing 'an annual privilege tax or occupation fee' of twenty cents an acre on those holding more than 1,000 acres of timber land in the state imposes a property tax; and that a tax on those pursuing the business of extracting turpentine from standing trees, of one-fourth of one cent on each box cut or chopped on the trees, is a property tax and not a privilege tax. A gross production tax imposed on mining companies as a substitute for an *ad valorem* property tax has been held to be a property tax rather than an occupation tax."

In 26 *Ruling Case Law,* section 209, at page 236, the distinction is forcefully stated as follows:

> "An excise is a tax upon the performance of an act, the engaging in an occupation or the *enjoyment*

> *of a privilege.* * * * It is not ownership which is the subject of the tax, but *the election* during the taxing period of the owner to take advantage of one of the elements which are involved in the ownership, namely, *the right to use.*" (Italics ours.)

The leading case on the subject is *Billings v. United States,* 232 U. S. 261, 58 L. Ed. 596, 605. Here the Supreme Court of the United States had before it a tax "upon the use of every foreign-built yacht, pleasure boat or vessel." It was contended that this was a property and not an excise tax. In a well considered opinion Mr. Chief Justice White answered this contention as follows:

> "It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the *use* of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word "use" in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements, ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership, and distinguishes between ownership and use, since it bases the tax not upon the former, but upon the latter. From this it follows that it is not ownership, but *the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership,—the right to use which is the subject upon which the statute places the excise duty.* In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership,

> for that, in the statutory sense, could exist without use having taken place. . . . Let it be conceded that the ownership of property includes the right to use; plainly, we think, as use and ownership are distinguished one from the other in the provision, the word "use," as there employed, means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster: 'The act of employing anything or of applying it to one's service; the state of being so employed or applied.' If the use which arises from the fact of ownership, without more, was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision, and made the basis of the tax imposed." (Italics ours.)

By reason of numerous decisions of the state courts recognizing this same fundamental distinction the rule has now become well established. In 26 *Ruling Case Law,* pages 36-37, the reason for the rule is clearly stated.

> "A tax on the ownership of property, whatever it may be called, is a property tax. A tax on a thing is a tax on all its essential attributes and a tax on an essential attribute of a thing is a tax on the thing itself. So that a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property. It follows that a tax on the attributes of ownership, or on the right to make the only use of property for which it is of any value, is a tax on the property itself."

Much of the language of the text last quoted is taken from the case of *Thompson v. Kreutzer*, 112 Miss. 165, 72 S. 891, where plaintiff sought an injunction against the collection of a tax of twenty cents an acre on certain types of lands. The attorney general contended the tax was upon the privilege of ownership, but the court rejected this argument and held that such a tax would be necessarily a tax on the property itself. The same distinction was made by the same court in the case of *Thompson v. McLeod,* 112 Miss. 383, 73 S. 193. Here the court upheld an injunction restraining enforcement of an act levying what was termed by the statute itself "an annual privilege tax or occupation fee * * * upon each person pursuing the business of extracting turpentine from standing trees" at the rate of one-fourth of one cent for each cup or box extracted. The court looked through the literal wording of the statute and determined its true intent to be to tax a use necessarily incident to ownership and therefore in fact a tax upon the privilege of ownership, and very forcefully swept aside the subterfuge resorted to by the legislature, in the following language:

> "If the tax here questioned can lawfully be imposed, then the Legislature of our state in a desperate search for revenue can effectually brush aside the essential feature of equality and uniformity demanded by the Constitution. The provision that property shall be taxed in proportion to its value would be nullified, and the integrity of the Constitution itself destroyed."

Again in *Barnes v. Jones,* 139 Miss. 675, 103 S. 773, the Supreme Court of the State of Mississippi applied the rule enunciated in *Thompson v. Kreutzer, supra,* and on

the authority of that case held what was called a "privilege tax" of one-half per cent "upon the right of residents of Mississippi to own each and every share of the capital stock of non-resident corporations" to be in fact a property tax and hence invalid.

The State of Kentucky in 1920 imposed a tax of fifty cents a gallon on every person engaged in the business of manufacturing distilled spirits and in the business of owning and storing such spirits in bonded warehouses in the state and in removing the same therefrom for any purpose. It was made the duty of the warehouseman to collect this tax, which, however, was not payable until the liquor was removed from bond or transferred under bond from the state. In *Craig v. Taylor,* 192 Ky. 36, 232 S. W. 395, the tax was held invalid as a property tax. The court said:

> "It is conceded by appellants that as an *ad valorem* tax it cannot be sustained, and though called an annual tax it was not intended to be such. The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

Later an action for injunction against enforcement of the same tax was appealed to the United States Circuit Court of Appeals in the case of *J. & A. Freiberg Co. v. Dawson,* 274 F. 420, where the act was held to be invalid under the Fourteenth Amendment. In another case involving the same Kentucky act, an appeal was taken to the Supreme Court of the United States. The decision is reported as *Dawson v. Kentucky Distilleries Co.,* 255 U. S. 288, 65 L. Ed. 638, and the opinion of Mr. Justice Brandeis is an excellent illustration of the force of the rule.

On page 293 of the first named report, in answer to the respondents' contention that the act imposed an excise tax upon the business or occupation of warehousemen, the learned justice said:

> "A particular lot of whiskey may pass through a dozen bonded warehouses without one of them being obliged to pay the tax. For the only warehouseman required to do so is he who has the whiskey on storage at the time of its removal from bond (government), tax paid, or when it is transferred in bond to another state."

Nor was the tax imposed upon the alleged business of storing whiskey in bond, for

> "So long as the whiskey is stored in bond within the State it is free of the tax."

It was then contended that the tax was imposed upon the business of *owning, storing, and removing* whiskey from bond, but the court pointed out that the tax would be payable on account of whiskey removed from bond although there was no storage for any appreciable time. Nor was the tax imposed upon the *business* of removing whiskey from storage, for the tax was imposed upon any single transaction, and a single transaction did not constitute engaging in business. The Court concluded:

> "The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale. . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value."

As a result of the foregoing interpretation the tax was held to be imposed upon an act necessarily incident to ownership and therefore a property tax, and the Court said:

> "To levy a tax by reason of ownership of property is to tax the property."

In the majority opinion of the Supreme Court of the Territory of Hawaii [Tr. No. 6454, pp. 40-51] the automobile weight tax is held to be an excise tax, and authorities are cited sustaining the validity of excise taxes in other jurisdictions. The court recognizes the fact that it is not limited to motor vehicles which actually use the highways, but waives this objection aside as immaterial on the theory that all motor vehicles are designed for use upon the public highways and will be so used within the taxable year. But in so doing the court ignores the fact that it is this very limitation of the application of a tax to vehicles actually using the public highways which characterizes it as an excise. In the case of *City of Terre Haute v. Kersey,* 159 Ind. 300, 64 N. E. 469, on page 471 of the latter report, the court says:

> "It is not the vehicles, as articles of property, which are sought to be taxed by virtue of the ordinance, but it is the use thereof on the public streets. This proposition, we think, is made clear by the fact that the owners of vehicles might, without violating the ordinance, use them on their own premises or on the premises of their neighbors, or they might each or all manufacture and *keep for sale* any number of vehicles, without in either case being liable, under the ordinance, to the tax imposed. It is only when they use their vehicles on the streets of the city that they may be subjected to the payment of the annual tax for the privilege of such use." (Italics ours.)

And in *Ex Parte Hoffert,* 34 S. D. 271, 148 N. W. 20, the court said:

> "From this, it is plain that the amount involved is in no sense a property tax. It is not levied upon the vehicle itself nor upon its possession or ownership, but is collected only for the privilege of using such vehicle upon the public highway. Under this law, a man may own one, or any number of motor vehicles, but if their use or operation is confined to his own premises, they will be subject to no license fee or tax other than a personal tax based upon assessment thereof."

In the case of *Jasnowski v. Dilworth,* 191 Mich. 278, 157 N. W. 891, the court used the following language:

> "A careful study of the various provisions of the act persuades us that a privilege tax was intended rather than a property tax. The tax is not imposed upon the property, but upon the privilege of operating a motor vehicle upon the highway. That it was not intended by the Legislature to impose a property tax is evidenced in part by the fact that one may own one or more vehicles and have them in his possession, and they will not be subject to the provisions of the act, unless he chooses to operate them upon the highway."

In the case of *Ft. Smith v. Scruggs,* 70 Ark. 549, 69 S. W. 679, the court said:

> "A resident of the city may keep and use at his place in the country, as many vehicles as he pleases, but he is subject to no tax under this statute unless he uses them on the streets of the city. He can keep and use vehicles anywhere in the world except on the streets of the city of his residence, and he is not liable to the tax. The license fee imposed is, then,

> not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, which is taxed. We are therefore of the opinion that the statute is not subject to the criticism that it authorizes double taxation, and the contention of the defendant on that point must be overruled."

In these cases the tax was held to be an excise *because* of this limitation in its application to cars used on the public highways. To ignore this distinction and hold the tax to be an excise despite its applicability to motor vehicles used exclusively on private roads or not used at all is to ignore the definition of an excise as a tax upon the election of the owner, during the taxing period, to take advantage of the right to make a particular use of his property.

Let us examine the position taken in the majority opinion in further detail. The court says [Tr. No. 6454, pp. 49-50]:

> "In other words, that the tax is not (aside from its regulatory aspects) a tax on property is obvious from the fact that the mere weight of automobiles does not bear any relation to their value. Cars retain their weight in spite of increasing age. A Packard or a Lincoln ten years of age weighs far more than a small Ford fresh from the factory and yet the latter may be of far greater market value. The tax, in addition to being an exercise of the police power, is imposed on the privilege of using these vehicles on the public highways,—vehicles which, as above pointed out, not only require expensive highways but also endanger persons and property and necessitate added police protection—and does

not apply or is not imposed on vehicles which, lacking vital parts, clearly are not intended for use on the highways, and, in truth, are not "automobiles" or "power-driven vehicles." This latter class of vehicles would bear the ordinary property tax of a percentage on their value.

While section 1306 does not (in the case of second-hand cars) in words limit the tax to motor vehicles which actually use the highways, it imposes a tax on all complete, usable second-hand cars on the theory that they will be used on the highways. The instances of ownership of complete, second-hand vehicles, in good running order, on hand and unused for a whole taxable year are extremely rare."

The court is evidently of the opinion that since all motor vehicles, that is, power driven vehicles, are intended for use upon the highways they may all be subjected to an excise tax upon their present or prospective use of the highways. This position is a decided innovation in the law of excise taxation and a distinct departure from the definition of an excise tax. An excise is by very definition an imposition upon *actual* exercise of the privilege conferred. It is the *election to exercise* one of the uses inherent in ownership of property which is the subject of the tax and not the power or even the probable intention to enter upon that use within the taxable period. Furthermore, this extension of the applicability of an excise tax is a dangerous invasion of the constitutional rights of the citizen. If, under the guise of an excise, the legislative bodies can in fact levy a property tax upon all property designed for a particular use, the constitutional limitations requiring the taxation of property according to its value are evaded and nullified. If such a principle were gen-

erally adopted a tax might be imposed upon all merchants, based upon their net income, for the privilege of selling tobacco, regardless of whether the merchants actually sold tobacco or even whether they carried it in stock, simply because in the opinion of the legislature all merchants intended to sell tobacco. The hardware merchant and the proprietor of the stationery store would be subjected to what would be called an excise tax, but what would be in fact a property tax. The legislature would be presumed to have had full information concerning matters in respect to which it legislates and the courts would therefore feel constrained to accept the finding of fact as to intention to use adopted by the legislature. We see at once the *reductio ad absurdum* of the position taken by the territorial court.

The same majority opinion [Tr. No. 6454, pp. 46-47] contains a quotation from the case of *Camas Stage Co. v. Kozer,* 104 Ore. 600, 615, 618, 619, which is relied upon to established the proposition that the automobile weight tax is not a property tax *for the reason* that the mere weight of automobiles bears no relation to their value. It is submitted that the Oregon court intended quite a different meaning. In that case the tax under consideration was levied upon motor vehicles actually using the public highways and was based upon weight; hence, in the language of the court it was a charge upon privilege and not a tax upon property. The court went on to say that the imposition of the same tax upon an old car of slight value as upon a new car of the same weight but of much greater value, could not be valid if the tax were assessed against property rather than the use of the high-

ways. The interpretation placed upon the language of the Oregon court in the majority opinion resolves itself into the proposition that whenever a tax is not based upon value it must be an excise tax, thus disregarding the numerous cases in which property taxes have been properly declared unconstitutional for the very reason that they were not measured by value. The test of a property tax must ultimately be not whether it is measured by the value of the property, but whether it is certain to be imposed by reason of the mere fact of ownership.

The evolution of the Hawaiian automobile weight tax casts further lights upon its character as a property tax. In the year 1903 the legislature of the Territory of Hawaii passed an act cited as S. L. 1903, Act 54, 278, which reads in part as follows:

> "Section 9. All carriages, wagons, wagonettes, hearses, omnibuses, drawn by horses or mules, and automobiles *used for the conveyance of persons,* shall be subject to an annual tax of five dollars ($5.00) each, to be paid by the owners thereof." (Italics ours.)

This tax was clearly intended as an excise because it was imposed only upon automobiles actually "used for the conveyance of persons." It was levied upon use rather than upon ownership. In 1905 the legislature saw fit to amend the automobile tax. The phrase "used for the conveyance of persons" was dropped from the automobile tax in the law of 1905 and the tax extended to all automobiles. The legislature decided to impose the tax upon the ownership of cars rather than upon their use. All automobiles whether used for the conveyance of persons or not were subject to the tax.

> "Section 1203. Brake, Sulky, Ox-cart and Automobiles tax. All brakes and sulkies shall be subject to an annual tax of two dollars each to be paid by the owners thereof, all ox-carts shall be subject to an annual tax of five dollars each, to be paid by the owners thereof, and all automobiles shall be subject to an annual tax of twenty dollars each, to be paid by the owners thereof."

The court's attention is called to the fact that the legislature in the same year re-enacted the tax on carriages, wagons, wagonettes, etc., and still conditioned this tax upon the actual use of the property.

> "Section 1204. Carriage, &c., tax. All carriages, wagons, wagonettes, hearses, omnibuses, drays, carts and other vehicles not herein specified, drawn by horses or mules, and used for the conveyance of persons, freight or merchandise shall be subject to an annual tax of five dollars each, to be paid by the owners thereof."

It is submitted that within two years after enacting the automobile tax the legislature consciously changed it from an excise to a property tax. Otherwise, why would they have preserved the excise feature in the carriage tax when they expunged it from the automobile tax? This was done to tax the mere ownership of automobiles rather than their use.

Section 1315, R. L. 1925, of the Territory of Hawaii, reads in part as follows:

> "Except as exempted or otherwise taxed, all real and all personal property, within each taxation division shall be subject to a tax each year of such rate per cent upon the full cash value thereof as shall be fixed and determined for that year in the following manner and generally for the following purposes:"

There can be no doubt as to the meaning of this section —that, except if real or personal *property* are exempted or otherwise taxed, they shall be subject to an *ad valorem* tax. The provision is aimed against double taxation and in order that *property* may fall within the exception stated, it is necessary that it be subjected to some other *property tax.* It has repeatedly been held that it is not double taxation for a legislature to impose in addition to an *ad valorem* tax on property, an excise or privilege tax upon the use to which that property is put. In *Cooley on Taxation,* 4th Edition, volume 1, pages 493-5, the rule is stated as follows:

> "It is a settled rule that it is not double taxation to impose an *ad valorem* tax on property used in a business and also to impose a license tax on the business or the use of the property. This rule applies equally well to taxation of corporations. Both a license or franchise tax and a tax on the property may be imposed. A tax on vehicles, where a license tax, is not double taxation although the vehicles are also taxed as part of the property tax. For instance, an *ad valorem* tax on automobiles does not preclude an additional excise or privilege tax. Thus, a license tax may be imposed for the use of motor vehicles on the public roads although an *ad valorem* tax is paid on such vehicles and they are not used for hire or charge."

Berry on Automobiles, 6th Ed., Vol. 1, p. 87, states the rule as follows:

> "A license tax may be imposed by the Legislature for the use of automobiles on the public highways even though an *ad valorem* tax is paid on such automobiles and they are not used for hire, and even though a license tax is not imposed for the same use by vehicles of other kinds."

But if any doubt may still remain as to the proper interpretation of section 1306, R. L. 1925, the automobile weight tax law, it must be finally dispelled by the case of *Von Hamm-Young v. Long,* 30 Haw. 260. In that case the complainants were owners of new cars in stock on which the assessor attempted to levy an *ad valorem* tax. The Court quoted that portion of section 1315, R. L. 1925, hereinabove set forth, and said:

> "There is no claim that the motor vehicles owned by the taxpayers on January 1, 1927, come within the class that is entirely exempt from taxation but it is claimed that they are otherwise taxed and are therefore not subject to the *ad valorem* tax that was assessed against them. This claim is based on section 1306, R. L. 1925."

After quoting the latter section in full, the court concluded:

> "The tax provided by section 1306 inevitably falls on 'new motor vehicles carried in stock for purposes of sale' at the expiration of the three months' exemption. They are therefore otherwise taxed within the meaning of section 1315."

Thus the court held that motor vehicles fall into the exception provided in section 1315—that is, that motor vehicles, being subjected to another *property tax,* could not be further subjected to an *ad valorem* tax. If, in the opinion of the court, the automobile weight tax had been considered a privilege or excise tax, under the rule above stated an *ad valorem* tax might also have been assessed and there would have been no double taxation.

The greater part of the decision in the Von Hamm-Young case is devoted to disposing of the contention that

the automobile weight tax is an excise by reason of certain provisions thereof. On page 266 the court said:

> "It is also contended by the tax assessors that neither new motor vehicles nor second hand motor vehicles are taxable under the provisions of section 1306 until they are in actual use or intended for actual use and that inasmuch as the motor vehicles which the taxpayers the Von Hamm-Young Company and the Royal Hawaiian Sales Company owned on January 1, 1927, were not at that time in use or intended to be used they were not then taxable under section 1306 and therefore were not exempt from the *ad valorem* tax as provided by section 1315. This conclusion of the tax assessors is based on a false premise. There is nothing in section 1306 that indicates any intention by the legislature to suspend the tax therein provided until the vehicles mentioned, whether new or secondhand, should be in actual use on the highways or intended for such use. It is true, as pointed out by the tax assessors, that the method of ascertaining the amount of the tax on motor vehicles is by weight and not by estimating their value. It is also true that when they are weighed they must have upon them all the fittings which they have when in ordinary use, including fuel and water. None of these provisions of the statute, however, is inconsistent with its positive mandate that all motor vehicles, other than new ones kept in stock for purposes of sale, shall be taxed on January 1 of each year. Nor can it reasonably be inferred from any of these provisions that new motor vehicles kept in stock for purposes of sale are not taxable immediately after the expiration of the three months' period of exemption. Nor does the contention of the tax assessors derive any support from other provisions of section 1306 relating to the size and display of num-

> ber plates and other requirements that are manifestly only applicable when a motor vehicle is ready to take the road. These are obviously merely police measures and have nothing at all to do with the question of taxation."

It should be carefully noted that the assessors contended that section 1306 was an excise imposed upon actual use *or the intention to use* the highways, but the court said:

> "There is nothing in section 1306 that indicates any intention by the legislature to suspend the tax therein provided until the vehicles mentioned, whether new or second-hand, should be in actual use on the highways *or intended for such use.*" (Italics ours.)

In the opinion of the court the automobile weight tax was imposed upon all motor vehicles even if there was not in fact even an intention upon the part of their owners to use the public highways.

A careful examination of both the majority and minority opinions constituting the decision of the Supreme Court of the territory in the principal case will disclose no mention or even reference to the Von Hamm-Young case. In its zeal for upholding the enactment of the legislature the court ignored the controlling decision.

It is submitted that the decision in the Von Hamm-Young case is conclusive and binding upon this Honorable Court as to the interpretation of the weight tax as applying to *all* motor vehicles; and it is further submitted that the characterization of that tax as an excise tax in the principal case is not binding or even of persuasive effect. In *St. Louis Southwestern Railway Co. v. Arkansas,* 235 U. S. 350, 59 L. Ed. 265, the Court said, at page 362 of the first named report:

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

The decision on this point was followed in *St. Louis Cotton Compress Co. v. Arkansas,* 260 U. S. 346, 348, 67 L. Ed. 297, 298; and the language was quoted in full in *Hanover Ins. Co. v. Harding,* 272 U. S. 494, 509, 71 L. Ed. 372, 380, followed by a full discussion of the question. In the famous recent case of *Macallan Co. v. Massachusetts,* 279 U. S. 620, 73 L. Ed. 874, the Supreme Court of Massachusetts had held the tax to be, as the statute itself declared, an excise tax rather than an income or property tax. On page 625 of the official report, Mr. Justice Sutherland, in delivering the opinion of the Court, said:

> "The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. . . . If, by varying the form,—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at,—the sub-

> stance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to nought. The rule is otherwise."

During the last session of the Supreme Court of the United States the full force and effect of this rule was recognized in the case of *Storaasli v. State of Minnesota,* (Decided Mar. 23, 1931), 75 L. Ed. 465, where the Court said:

> "This court, while bound by the state court's decision as to the meaning and application of the law, decides for itself the character of the tax, and whether if applied to the appellant it affects his constitutional rights."

Much emphasis was placed by appellees in the principal case, during its presentation in the Territorial Supreme Court, on the practical difficulties of enforcement involved in the limitation of a tax to automobiles actually using the public highways. It was contended that, if appellants' position was correct that an excise tax must necessarily be limited in application to automobiles actually exercising the privilege of using the public highways, it would be impossible to ascertain whether any particular car was used upon the public highways. In this connection the case of *Raymond v. Holm,* 165 Minn. 215, 206 N. W. 166, is enlightening. There the Minnesota court said, on page 167 of the latter report, with regard to the Minnesota tax:

> "It is imposed only on motor vehicles using the public highways and is devoted exclusively to the improvement of such highways . . . all motor vehicles are prohibited from using the public highways until the tax is paid. While the main purpose

> of this provision was doubtless to provide an effective means for enforcing payment of the tax, it, in fact, makes the privilege of using the highways depend upon such payment, and the tax is thus given the effect of a privilege tax."

In all of the numerous jurisdictions imposing privilege taxes upon the use of the public highways by motor vehicles, the grant of that privilege is conditional upon the payment of the tax, which payment is evidenced by license plates attached to the vehicles. It must be apparent that motor vehicles using the public highways without payment of the tax can be readily detected by the absence of license plates on the vehicles themselves. Appellees' contention, which was accepted by the Territorial Supreme Court, is without weight, and a limitation of the tax to those vehicles actually using the highways would involve no administrative difficulties. The Hawaiian tax authorizes the seizure of motor vehicles which have not paid the tax "wherever found"; with equal facility, a true excise tax might be enforced by seizure of motor vehicles appearing on the public highways without license plates.

III.

Construed as a Property Tax the Automobile Weight Tax Is Unconstitutional.

The Organic Act vests in the Territory of Hawaii the power of taxation in general terms. Section 55 provides:

> "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. * * *"

and section 5 of the Organic Act reads as follows:

> "That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States."

It has never been definitely decided whether or not the Fourteenth Amendment to the Constitution of the United States is applicable to the Territory of Hawaii. Nor is it necessary that this Honorable Court decide the question in the principal case, for whether the Legislature of the Territory of Hawaii is restricted by the provisions of the Fourteenth Amendment or by the terms of the Fifth Amendment to the Federal Constitution, it is quite clear that by the force of one or the other of these amendments it may not deprive any person of life, liberty or property without due process of law. In the case of *Hawaiian Trust Company v. Smith*, 31 Haw. 196, 201, the Court said:

> "In so far as the statute seeks to impose a higher rate of tax upon aliens resident in the Territory than is imposed upon American citizens resident in the Territory the provision is unconstitutional and invalid in that it violates the requirement of Article V of the Amendments to the Constitution that 'no person shall be . . . deprived of life, liberty, or property, without due process of law.' It has not as yet been judicially determined, either by this court or by the Supreme Court of the United States, whether the Fourteenth Amendment, in its provision that 'no state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdic-

> tion the equal protection of the laws,' is applicable to the Territory of Hawaii. However that may be, it has been expressly held that aliens are 'persons' within the meaning of the equal protection clause and also within the meaning of the prohibition of the Fourteenth Amendment against deprivation of life, liberty or property without due process of law. See for example Yick Wo v. Hopkins, 118 U. S. 356, 369; Toyota v. Hawaii, 226 U. S. 184, 191; and Truax v. Raich, 239 U. S. 33, 39. It would seem to follow necessarily that aliens are equally protected by the same provision in practically the same language found in the Fifth Amendment against deprivation of life, liberty or property without due process of law."

It was contended in the lower court on behalf of appellees that the Fifth Amendment is not a limitation upon the taxing power, and this contention was adopted in the concurring opinion of Parsons, J. To judge the strength of this contention it is necessary to consider first of all the infrequency of cases raising the question. Taxation matters which must be declared invalid, if at all, by reason of the provision of the Fifth Amendment, are extremely rare and heretofore have been confined to cases of Federal taxation. Because of the admitted presumption in favor of the constitutionality of a legislative enactment and in view of the more mature and thorough consideration of constitutional restrictions in the Congress of the United States than in the legislatures of the various states, it has very rarely been necessary to declare these Federal taxing measures invalid. But the field is not without judicial precedent; and a very strong and decided tendency may be observed in

the more recent cases to fully acknowledge the limitations of the Fifth Amendment upon the taxing power. In *Nichols v. Coolidge,* 274 U. S. 531, 71 L. Ed. 1184, 1193, the Court said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. Ed. 493, 504, L. R. A. 1917 D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917 B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. Ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, 20 Sup. Ct. Rep. 747. And we must conclude that par. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

The above language was quoted and the decision followed in *Boyd v. United States,* 34 F. (2d) 491.

In *Frew v. Boyers,* 12 F. (2d) 625, 630, the decision was to the same effect as in *Nichols v. Coolidge, supra,* holding section 402 (c) of the Federal Estate Tax Act unconstitutional, but was not decided upon the precedent of that case. In the concurring opinion of Learned Hand, J., the contention of appellees is discussed as follows:

> "But it is answered that this result goes only to the equal assessment of the tax and must rest upon

the Fifth Amendment, which does not apply to federal taxation. I quite agree that the Supreme Court has in many cases implied or said as much. Veazie Bank v. Fenne, 8 Wall. 533, 19 L. Ed. 482; Treat v. White, 181 U. S. 264, 269, 21 S. Ct. 611, 45 L. Ed. 853; McCray v. U. S., 195 U. S. 27, 81, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; United States v. Doremus, 249 U. S. 86; Billings v. U. S., *supra,* 282 (34 S. Ct. 421); Flint v. Stone Tracy Co., *supra,* 158 (31 S. Ct. 342). If the rule is to be taken unconditionally, taxpayers may be selected by lot and assessments may vary with the price of wheat. Perhaps it would have been necessary to go so far, had it not been for the opinions in Brushaber v. U. S., *supra,* 24 (36 S. Ct. 236), and Barclay & Co. v. Edwards, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703, and the strong intimations in Lewellyn v. Frick, 268 U. S. 238, 251, 252, 45 S. Ct. 487, 69 L. Ed. 934. But these make it clear that the power is not utterly absolute. A tax may be so 'arbitrary and capricious,' its 'inequality' so 'gross and patent,' that it will not stand, and, as I can think of no other pertinent constitutional limitation but the Fifth Amendment, it seems to me that the rule is not as stark as the defendant argues. If there be any limit whatever, I own I cannot, except in fancy, think of a case more plainly beyond it than this."

Blodgett v. Holden, 275 U. S. 142, 72 L. Ed. 206, was another case in which the applicability of the Fifth Amendment was recognized. On page 147 of the official report the Court said:

"So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during

> January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment."

And in *Untermyer v. Anderson,* 276 U. S. 440, 445, 72 L. Ed. 645, 647, the Court held that the gift tax provisions of the Revenue Act of 1924

> "so far as applicable to *bona fide* gifts not made in anticipation of death and fully consummated prior to June 2, 1924, . . . are arbitrary and invalid under the due process clause of the Fifth Amendment."

During the last session of the Supreme Court of the United States the Court again recognized the limitations of the due process clause. In *Coolidge v. Long* (decided Feb. 24, 1931), 75 L. Ed. 308, 311, the Court said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R., 240 U. S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703. See, also, Knowlton v. Moore, 178 U. S. 41, 77, 20 S. Ct. 747, 44 L. Ed. 969."

And in *Memphis & C. Ry. Co. v. Pace* (decided Jan. 5, 1931), 75 L. Ed. 178, 180, the Court likewise recognized the effect of the due process clause as a limitation upon the taxing power of the *state.* In that case the Court said:

> "But, however the tax may be laid, if it be palpably arbitrary and, therefore, a plain abuse of power, it falls within the condemnation of the due process clause. . . ."

And in the case of *J. & A. Freiberg Co. v. Dawson,* 274 F. 420, where a state tax was also in question, the Court said:

> "If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process."

It is submitted that the citizens of the Territory of Hawaii are not entirely without constitutional guarantees against the arbitrary exercise of the taxing power. In *Toyota v. Hawaii,* 226 U. S. 184, 57 L. Ed. 180, it is apparent from the opinion that the United States Supreme Court assumed that a Hawaiian statute setting forth an unreasonable classification for taxation would be unconstitutional; the Court, however, did not specify which constitutional provision was applicable. Whether or not the equal protection clause of the Fourteenth Amendment can be invoked in their behalf, the due process clause of the Fifth or Fourteenth Amendments is an equally effective protection. If it should be contended that the due process clause is a restriction less forceful and of a lesser inhibitory effect than the equal protection clause—in other words, that merely discriminatory taxation is not thereby invalidated, the decision in the case of *Hawaiian Trust Company v. Smith, supra,* must be held to be erroneous, and, in the language of Mr. Justice Hand in *Frew v. Bowers, supra,* "taxpayers may be selected by lot and assessments may vary with the price of wheat." The tax in the Hawaiian Trust Company case sought to impose a higher rate upon aliens

than upon American citizens, both resident in the territory, and was held invalid solely by reason of this discrimination, which constituted a deprivation of property without due process. In 6 *R. C. L.*, at p. 367, it is said:

> "Due process of law guaranteed by the Federal Constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. In order that a statute may comply with the necessary requirements as to due process of law, it must not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws."

And in *United States v. Yount*, 267 F. 861, at p. 863, the Court said:

> "It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment."

To assert that any type of discrimination in taxation is valid under the due process clause is to suffer tyranny and oppression, and to tax property without reference to its value is as arbitrary and capricious as to make the assessment vary with the price of wheat.

The foregoing discussion as to the effect of the Fifth Amendment is in no sense an admission or concession that the Fourteenth Amendment does not apply to the

Territory of Hawaii. To decide the applicability of that particular amendment and the equal protection clause contained therein, it would be necessary to interpret the language of Congress in the sections of the Organic Act quoted, whereby the territory is restricted by those provisions of the Federal Constitution "locally applicable." *Peacock v. Wright*, 1 U. S. Dist. Ct. of Hawaii 294. It would be necessary to decide what was meant by Congress in saying that the Constitution should have the same force and effect within the territory as "elsewhere in the United States." It would further be necessary to consider the effect of provisions in the Organic Act recognizing the continuing force of certain early laws of the territory. All this would involve a discussion wholly unessential to a decision in the principal case, for the due process clause is, in any event, a restriction on the Legislature of the Territory of Hawaii and as strong a protection against arbitrary and discriminatory taxation as may be wished.

The tax here in question is measured by the weight of the motor vehicle and is assessed at the rate of one cent per pound. While it is generally true that heavy cars are more costly when new than light cars, it is equally true that they depreciate in value more rapidly than light cars. Unfortunately, they do not become lighter as they grow older. Automobiles weighing four or five thousand pounds are usually depreciated after five years' use to a nominal value of $50.00 to $150.00. Yet, under the tax before the court, they are assessed precisely the same as if they had just come from the

factory and are worth their original value. As a basis of valuation for a property tax, classification by weight is purely arbitrary.

Taxation of property without regard to its value has everywhere been conceded to be invalid. In 26 *R. C. L.*, at p. 244, the rule is stated as follows:

> "As value is the only measure which can be applied indiscriminately to all the different classes of property, real and personal, to achieve uniformity and equality the valuation of property is indispensable, and property can be taxed only in accordance with its value. A specific tax on a particular class of property when other property is taxed in proportion to its value is unconstitutional. A tax on any property in specie or by the acre or in any manner other than in proportion to its value is objectionable."

And in *Cooley on Taxation,* 4th Ed., Vol. 1, pp. 620-22, the following text statement is fully supported by the citation of authorities:

> "It is self-evident that a property tax of a certain sum imposed on particular property without regard to value violates the rule as to equality and uniformity where the value of such property varies. To illustrate: Suppose all farm land should be taxed a dollar an acre. No one would attempt to defend the equality of such a tax as applied to the land of one person worth $100.00 an acre and to the land of another worth $10.00 an acre. The decisions of the courts are all in harmony, in support of this rule. The Legislature cannot authorize a specific tax on property not of uniform value, as of cotton

> by the pound, nor, it seems, on drays, wagons, etc., proportioned to the number of animals drawing them. So the provision is violated by an act levying a tax of $1.00 per annum upon each road wagon in a certain county for the benefit of the public roads. Likewise a tax on sheep at so much a head is not uniform when other like property is taxed according to value. So a tax of $1.25 on each bicycle in use, irrespective of the value, where regarded as a property tax, violates the rule as to equality and uniformity for the reason that the value of all bicycles is not the same."

The concurring opinion of Parsons, J., cites the case of *State ex rel. Fargo v. Wetz,* 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731, for the proposition that property taxes need not be levied on an *ad valorem* basis if assessed according to an equitable standard free from the vice of arbitrary classification [Tr. No. 6454, p. 54]. That case held the North Dakota vehicle tax to be a license or excise tax (see page 738 of the last-named report), and it is obvious that excise taxes need not be assessed against the value of the property indirectly affected; the *ad valorem* requirement applies only to property taxation (see annotation on the case at 5 A. L. R. 759-60). The language quoted is, therefore, purely *dicta;* and even this *dicta* concerns itself only with the limitations of state constitutions and does not take into consideration the due process and equal protection clauses of the Federal Constitution. It is submitted that a *property* tax assessed without regard to value is invalid, and *no decision can be found to the contrary.*

Many of the cases involving the taxation of property without regard to value have been decided under the pro-

visions of state constitutions. But it must be observed that discriminatory taxation is equally a violation of the provisions of the Federal Constitution (*Cooley on Taxation,* 4th Ed., Vol. 1, pp. 614-15). In *Re Heck's Estate,* 120 Ore. 80, 250 P. 735, 736, the court said:

> "In determining whether legislative power was exceeded in the enactment of the law under consideration, we must look to such limitations as may be found in state and federal constitutions relative to the exercise of such power. It is well established that provisions of state constitutions requiring uniformity and equality in taxation do not limit the power of the Legislature in levying excises and inheritance taxes beyond those contained in the Fourteenth Amendment to the Federal Constitution guaranteeing 'equal protection of the law.'"

Speaking of provisions in state constitutions to the effect that taxation of property must be according to its value (*Cooley on Taxation,* 4th Ed., Vol. 1, p. 347), the author says:

> "The *ad valorem* requirement precludes the taxation of animals by the head, or cotton by weight, or coal or ore by the ton, or land by the acre or quarter section. Nor can vehicles be taxed a specified sum, without regard to their value, if the tax is a property tax."

In support of this latter proposition the case of *Smith v. Court of County Com'rs.,* 117 Ala. 196, 23 S. 141, is cited. There a special tax "for the benefit of the public roads" was levied upon vehicles at the rate of $2.00 a year for each log wagon and $1.00 a year on each bicycle or other vehicle. It is to be observed that the tax was

not limited to those vehicles using the public highways. In holding the tax void under provisions of the state Constitution requiring property taxes to be assessed in proportion to value, the court said:

> "It is plainly and unequivocally a tax on property, and the sum of the tax laid upon all vehicles in a given class is the same without regard to the value of the vehicle. A wagon worth $10.00 is taxed the same as one worth $100.00."

In *Ellis v. Frazier*, 38 Ore. 462, 63 P. 642, a property tax of $1.25 on all bicycles, levied without regard to their value, was held invalid.

No other case has been found involving a property tax on vehicles levied without reference to value. The lower court, however, evidently considered the case of *State v. Peterson*, 159 Minn. 269, 198 N. W. 1011, to be an authority supporting the validity of the automobile weight tax, even though it be conceded to be a property tax. This case deserves considerable study in view of the fact that the Minnesota law had been previously erroneously interpreted a property tax as well as an excise tax—in other words, a sort of hybrid, fulfilling the requirements of both. A Minnesota state constitutional amendment permitted taxes to be levied on "motor vehicles using the public streets and highways of this state, on a more onerous basis than other personal property." The Legislature, pursuant to this amendment, passed an act in which automobiles which were privately owned or which had previously used the highways were taxed on the same basis as those now using the highways. This act the court held to be a contemporary legislative interpretation of the amendment and therefore entitled to great

weight. Under the broad power of the Legislature to classify subjects for taxation, this classification was held constitutional. The court said:

> "The constitutional requirement is that all taxes shall be uniform on the same class of subjects. In classifying motor vehicles for taxation as it has, the Legislature adopted past or prospective use of the public highways as the basis for classification. *The burden of taxation is uniformly imposed upon all motor vehicles in the class thus created.* No classification is possible which will not result in occasional hardships. The Legislature might have provided that an automobile not operated on a public highway for an entire calendar year should be exempt in that year from the tax imposed by the act, but, if the tax in a particular year could not be collected unless the state could show that there had been a user of the highways at some time in the year, it might be difficult to enforce collection of the tax. This is a practical consideration which may have influenced the Legislature in adopting the rule prescribed by section 16. The rule has the merit of certainty—a consideration which might properly guide the exercise of legislative discretion." (Italics ours.)

The decision holds that automobiles, *because of* past or prospective use of the public highways, could be taxed at a higher rate than other property, a proposition with which appellants have no dispute. But this proposition must be carefully distinguished from the contention that an *excise* tax can be levied upon past or prospective use of the public highways. And, in sustaining the validity of the tax, the Minnesota court pointed out that "the burden of taxation is uniformly imposed upon all motor vehicles in the class thus created." This is not true in

the case of the Hawaiian automobile weight tax. Unlike the Minnesota tax, it is not based upon the value of the motor vehicles, but upon their weight, which has no relation to value. Assuming the Minnesota tax was a property tax, the case is undoubtedly sound, but is not authority in favor of the validity of the tax here in question. That the United States Supreme Court, in the case of *Storaasli v. State of Minnesota, supra,* declared the Minnesota tax to be an excise, merely assails the reasoning of the earlier Minnesota decisions calling it a hybrid tax; with the reasoning in *State v. Peterson* appellants fully agree.

IV.

Construed as an Excise Tax the Automobile Weight Tax Is Unconstitutional.

The position of appellees in the lower court, which was adopted in the opinion of that court, was that the automobile weight tax was an excise upon the use of the public highways and that its assessment against all automobiles could be justified on the theory that all automobiles would be used during the taxable year upon the public highways. If this Honorable Court should, notwithstanding the authorities hereinabove set forth, be of the same opinion, it is further submitted by appellants that, even if construed as an excise, the tax is arbitrary and unconstitutional. Taxes are levied upon the theory of a corresponding benefit to the taxpayers, and to charge a citizen for a use of the public highways which he does not actually enjoy, seizing his property if he should fail to pay the tax, is to take his property without due process of law

and to deny him the equal protection of the laws. In *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194, at page 202, the Court said:

> "The power of taxation, indispensible to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax and has been repeatedly held by this court to be beyond the power of the Legislature and a taking of property without due process of law. Railroad Company v. Jackson, 7 Wall. 262; State Tax on Foreign-Held Bonds, 15 Wall. 300; Tappan v. Merchants' National Bank, 19 Wall. 490, 499; Delaware & C. R. R. Co. v. Pennsylvania, 198 U. S. 341, 358."

By very definition an excise is a charge for the election to exercise a privilege (26 R. C. L. 236). It follows from this that any classification for the purpose of imposing an excise tax must first single out as subjects for the imposition only those who have elected to avail themselves of the privilege. An excise, from its very nature, is a charge for the *exercise* of a privilege; to impose it upon those who neither have exercised nor will exercise

the privilege within the taxable year is clearly arbitrary and oppressive.

In the majority opinion of the Supreme Court of the territory [Tr. No. 6454, p. 48], it was stated that the allegation that the vehicles of complainant "are not used upon the public highways" must be deemed to be qualified by the further allegation that complainant held said vehicles for sale, and that it followed, as a matter of common knowledge, that these vehicles were at times being used upon the public highways. It is submitted that the affirmative allegation of non-user upon the public highways is deemed admitted by the demurrer, and that the assumption by the court is entirely without foundation in fact. Complainant's vehicles were not in use upon the public highways or upon any highways whatsoever—and, even were it true that they were at times used for demonstration purposes, it could not be inferred that use was made of the *public* highways.

The weight tax is imposed upon all owners of automobiles. The junk dealer must pay one cent per pound for all automobiles not yet dismantled; the private automobile owner who has placed his car in storage without any intention to use it during the year is likewise subject to the tax; the automobile dealer, with his fleet of used cars, the majority of which will never again see service in any form, is subject to this so-called excise, along with those who actually use the public highways; and the plantation owner, with his trucks which are used entirely upon private roads constructed and maintained at his own expense, must pay a tax for the use by those trucks of the public highways. If this tax should be construed as an excise the appellant would be charged for the privi-

lege of using upon the public highways automobiles which will never again see service. Like the license tax upon all merchants, giving them the privilege of selling tobacco, it would be a charge for a privilege upon those who had no desire to exercise the privilege. To include these cars in any classification which would subject them to a tax for the use of the public highways would be to classify arbitrarily the uses subject to the tax without regard to the object of the tax.

Admitting, as appellants must, that a general property tax cannot be invalidated by showing that it is designed for a purpose conferring no benefit to the complainant taxpayer, it is yet submitted that an excise tax, imposed upon a particular use of a public facility, is invalid if it reaches individuals not exercising that use. Such a tax partakes of the nature of a property tax for the purpose of securing certain public benefits, which, by its terms, taxes the complainant's property but excludes it from those benefits. Such a tax has been held unconstitutional in *Atchison, T. & S. F. Ry. Co. v. Clark,* 60 Kan. 826, 58 P. 477.

The rule is too well settled to require the citation of numerous authorities that an excise tax must classify its subjects according to some scheme having a reasonable relation to the purpose for which it is imposed. A recent case is *Lowry v. City of Clarksdale,* 154 Miss. 155, 122 S. 195, where, on page 197 of the latter report, the court said:

> "While reasonable classification is permitted, such classification must be based upon some real and substantial distinction which bears a reasonable, just and proper relation to the objects sought to be accom-

> plished, and this within the field of the subject-matter concerning which the classification is made; or, in other words, the classification and the object to be accomplished must be germane."

And it is equally well settled that an excise tax classification bearing no reasonable relation to the benefit conferred is arbitrary and void. Leading cases are *Schlesinger v. Wisconsin,* 270 U. S. 230, 240, 46 S. Ct. 260, 261, 70 L. Ed. 557, 564, 43 A. L. R. 1224; *People in re Farrington v. Mensching,* 187 N. Y. 8, 79 N. E. 884; and *Borden Co. v. Dammann,* 198 Wis. 265, 224 N. W. 139, 143.

In *Waters-Pierce Oil Co. v. City of Hot Springs,* 85 Ark. 509, 109 S. W. 293, a city ordinance taxed all vehicles using the public streets at a fixed sum for various types of vehicles. It imposed a tax of $50.00 for each wagon used in delivering coal oil and gasoline, and lesser sums on wagons used for other purposes. The tax was held void as an unjust discrimination, the character of use having no relation to the destructibility of the public highways. By the same reasoning, automobiles not in use on the public highways at all should bear no tax, for their destructibility of the highways is nil.

If the tax imposed in the principal case is an excise upon the use of the public highways, and all motor vehicles are classified together for the purpose of the tax, regardless of whether they use the public highways or not, such a classification, as to automobiles not using the highways, bears no reasonable relation to the benefit conferred. A tax may be unreasonably discriminatory by reason of too broad, as well as too narrow, a classification.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035, it was said:

> "* * * a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality of taxation and of a just adaptation of property to its burdens."

And in *Trust Co. v. Treasurer,* 19 Haw. 262, the Court said:

> "It was said in Robertson v. Pratt, 13 Haw. 590, 600, 'Where natural distinctions require discrimination, not to discriminate works injustice.' That proposition cannot be disputed."

To hold that a Legislature may, under the guise of an excise for the use of the public highways, tax automobiles which will never exercise that use is to establish a precedent for the levying of taxes without relation to benefits conferred, which will prove embarrassing to the courts. Such a decision would open the door to every manner of arbitrary taxation, and its ultimate reach would bring untold suffering and hardship upon citizens heretofore safeguarded by constitutional guarantees. This case calls for a clear enunciation of the principle, now well established, that taxation without any regard to benefits conferred is arbitrary and capricious taxation and, hence, unconstitutional.

V.

The Court Has Equitable Jurisdiction.

The demurrer to the Amended Bill of Complaint in the Kitagawa case was submitted without argument, but was sustained, not only upon the ground relied upon in the ruling on demurrer to the original Bill of Complaint [Tr. No. 6454, p. 13], but also upon the ground that the complainant had a full, complete and adequate remedy at law [Tr. No. 6454, p. 27]. Thus the equitable jurisdiction of the trial court is here at issue. It should be observed, however, that the territorial Supreme Court did not pass upon the question of jurisdiction, but considered the validity of the tax upon its merits. This amounted to an assumption of jurisdiction.

On March 28, 1930, the date of filing the original Bill of Complaint, the complainant Kitagawa found himself in a very awkward position. He had on hand a number of second-hand automobiles which he was attempting to sell and which, by the terms of section 1306, were subject to tax. The respondents had made public announcement of their intention to seize all motor vehicles upon which said tax should not have been paid by the first of March, 1930. The purchasing public, as was alleged in the Amended Bill of Complaint, had been fully advised as to the terms of the statute and the threat of seizure on the part of respondents. No sales could be made unless the tax was paid. Although the respondents had effectively deterred prospective purchasers, by their threats of seizure, up to the time of the filing of the Bill of Complaint no action had been taken by them. They had effectively placed a cloud upon the title of com-

plainant's automobiles. In the meantime any of complainant's competitors who had paid said tax, illegal though it might be, could sell their automobiles.

Under these circumstances several courses of action were open to the complainant. He could have (a) immediately paid the tax under protest, but the settled law is that such a payment would have been voluntary and not recoverable in an action at law; (b) he could have waited until respondents used such duress in enforcing the tax as to have made its payment involuntary. However, the mere waiting was doing the complainant irreparable injury. The policy of inaction adopted by the respondents was causing complainant a loss of prospective sales, a loss which was not capable of definite ascertainment and hence was not compensable by money damages. The county had already delayed the use of compulsion for one month when the Bill of Complaint was filed. It might have delayed action indefinitely and the cloud upon the title to complainant's cars would have continued to exist. The only recourse remaining open to the complainant was (c) to invoke the equitable jurisdiction of the court by injunction against the enforcement of the tax.

It is conceded that the bare allegation of the illegality of the tax would not have been sufficient to invoke the equitable jurisdiction of the court. But the Bill of Complaint alleges much more than that. It sets forth affirmative grounds for injunctive relief by allegations that the complainant was suffering irreparable loss by reason of loss of sales and depreciation in value of his motor vehicles and that, because of the strictness of the rules of the

common law, complainant is without adequate legal remedy. These allegations must be deemed admitted by the demurrers. There is no statute of the Territory of Hawaii permitting a recovery of taxes paid under protest to the counties. Taxes paid to the territory itself under protest may be recovered by virtue of section 1444 R. L., 1925, and Act 131 of Session Laws, 1929; but these provisions are obviously not applicable to the counties of Hawaii. In order to secure a remedy at law complainant was forced to rely upon his common-law right to recover back taxes paid under compulsion. The question which arises is whether such common-law remedy is sufficiently adequate to preclude relief in equity. In the case of *Davis v. Wakelee,* 156 U. S. 680, 688, 39 L. Ed. 578, 584, the United States Supreme Court held:

> "In the uncertainty which appears to exist in that state, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. Boyce v. Grundy, 28 U. S., 3 Pet. 210 (7:655); Watson v. Sutherland, 72 U. S., 5 Wall, 74, 79 (18:580, 582); Rathbone v. Warren, 10 Johns, 587; King v. Baldwin, 17 Johns, 384, 8 Am. Dec. 415; American Ins. Co. v. Fisk, 1 Paige 90; Teague v. Russell, 2 Stew. (Ala.) 420; Southampton Dock Co. v. Southampton Harbour & Pier Board, L. R. 11 Eq. 254; Weymouth v. Boyer, 1 Ves. Jr. 416. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

This case was followed in *Dawson v. Kentucky Distilleries and Warehouse Co., supra,* where Mr. Justice Brandeis said:

> "It is well settled that 'if the remedy at law be doubtful a court of equity will not decline cognizance of the suit.' "

See, also, *Gammill Lumber Co. v. Board of Supervisors,* 274 F. 630, 632-3.

These decisions establish that where the remedy at law is doubtful the complainant is not obliged to speculate upon his chances of securing a remedy at law, but will be granted equitable relief. The more recent decisions go still further and assert the equitable jurisdiction of the courts in all cases where because of the nonexistence or uncertainty of statutory remedy at law, the complainant is thrown back upon his common-law remedy. In *Union Pac. R. Co. v. Weld County,* 247 U. S. 286, 62 L. Ed. 646, it was held that, in view of the fact that statutory provisions for the recovery back of taxes paid under protest were uncertain in their application, the legal remedy was sufficiently doubtful to permit the court to assert equitable jurisdiction. In *Dawson v. Kentucky Distilleries & Warehouses Co., supra,* injunctive relief was granted because at the time the action was brought the state decisions left doubtful the statutory remedy of recovering taxes paid under protest. In *Atlantic Coast Line v. Daughton,* 262 U. S. 413, 67 L. Ed. 1051, the Supreme Court, without dissent, held that the mere fact that the statutory remedy provided by the state to recover illegal taxes paid under protest was of recent date and had not been construed by the highest court of the state

was sufficient to sustain equitable jurisdiction. The Court said:

> "In the absence of such decision we cannot say the remedy at law is plain and adequate."

It must be remembered that, in holding that the absence or uncertainty of a statutory remedy was sufficient to invoke the jurisdiction of equity, the Court was well aware of the fact that the absence of such statutory remedy did not preclude the common-law legal remedy permitting a recovery of taxes paid under compulsion or duress, for in *Ward v. Love County,* 253 U. S. 17, 64 L. Ed. 751, the Court had expressly so held. The effect of the foregoing decisions that equity will grant an injunction whenever the statutory legal remedy is uncertain or so recent as not to have been construed by the state court, is that legal and equitable relief may often be coexistent.

In this connection attention should be given to the case of *Bank of Kentucky v. Stone,* 88 F. 383, a decision by William Howard Taft, then Circuit Judge, later Chief Justice of the Supreme Court of the United States. After stating the general principle that the mere illegality of the tax is not enough to invoke the powers of equity the learned judge said:

> "What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the city of Louisville, the county of Franklin, and the city of Frankfort to recover them back. Railroad Co. v. Commissioners, 98 U. S. 541. It is to be observed, however,

that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of Shelton v. Platt. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint."

Mr. Justice Taft then goes on to discuss additional grounds for injunctive relief and continues:

"It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient as the remedy in equity.'"

Mr. Justice Taft then quotes with approval a Kentucky decision, saying:

"But it is worthy of note that the Court of Appeals of Kentucky has held that, in the absence of a statute allowing an action to recover back from the state taxes illegally collected, the remedy by injunction is the only adequate one."

Some courts have based equitable jurisdiction for injunctive relief upon the fact that the legal remedy is inadequate in that it does not allow a recovery of interest on taxes paid. In *Cooley on Taxation,* 4th Ed., Vol. 3, p. 2596, the learned author, discussing actions for the recovery of taxes paid under compulsion, says:

> "Interest is recoverable only when expressly allowed by statute,"

and cites the decisions of state courts to this effect. In *Southern California Telephone Co. v. Hopkins,* 13 F. (2d) 814, 820, this Honorable Court said:

> "It is well established that where adequate remedy at law is not clear, and equity can furnish relief, a plaintiff ought not to be compelled to take the chance of obtaining relief at law. Davis v. Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578, 620, 67 L. Ed. 1051."

And, after pointing out that a legal action to recover taxes paid would not permit a recovery of interest, the court quoted with approval the decision of Judge Hand in *Proctor & Gamble Distributing Co. v. Sherman* (D. C.), 2 F. (2d) 165, as follows:

> "While I have been referred to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all."

In *Hopkins v. Southern California Telephone Co.,* 275 U. S. 393, 72 L. Ed. 329, the United States Supreme Court, on appeal, affirmed this assumption of equitable

jurisdiction. And in *Educational Films Corp. v. Ward* (decided January 12, 1931), 75 L. Ed. 223, at page 225 (footnote 2), the same principle is affirmed, with a citation of the foregoing cases.

It remains to be seen whether, aside from the above considerations as to the adequacy of the legal remedy at common law, the complainant had any legal remedy whatsoever under the facts of the principal case. In *Union Pac. R. R. Co. v. Dodge County Com'rs.,* 98 U. S. 541, 25 L. Ed. 196, the Court quoted from *Wabaunsee Co. v. Walker,* 8 Kan. 431, as follows:

> "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

And the Supreme Court said:

> "This, as we understand it, is a correct statement of the rule at common law."

This case has become the leading authority for the rule announced therein, and has been cited and quoted in almost every later case. See, for example, *Gaar, Scott & Co. v. Shannon,* 52 Tex. Civ. App. 634, 115 S. W. 361, in which the court quoted *Dillon on Municipal Corporations*, Vol. 2, p. 947, for the same language used in the Union Pacific case. The identical language is also used in the text of 27 A. & E. Encyc. (2d Ed.), p. 760.

In all actions for the recovery of taxes paid under compulsion the presumption is against the complainant.

The cases are collected in an annotation in 64 A. L. R. at page 64 in support of the following statement of the rule:

> "All payments of taxes are presumed to be voluntary until the contrary is shown, the burden resting on the party seeking to recover a payment to prove it was involuntary."

Not only is it necessary that, in order to render a payment involuntary, it must be made under compulsion or duress, but such coercion must be imminent and threatening at the time of payment. In the case of *United States v. Cuba Mail S. S. Co.,* 200 U. S. 488, 494, 50 L. Ed. 569, 571, the language of *Union Pac. R. R. Co. v. Dodge County Com'rs., supra,* is quoted with approval as authority on this requirement of imminence of duress, and the Court added:

> "There was no such imminence in the duress charged by defendant in error."

And in *Nashville, C. & St. L. Ry. Co. v. Marion County,* 120 Tenn. 347, 108 S. W. 1058, the court held:

> "Before we can hold a payment of taxes involuntary, it must appear that the officer had in his hands process authorizing the seizure of the person or property of the taxpayer, that such seizure of one or the other was imminent, and that there were no other legal means of protecting the person or property than by payment."

In *Miner v. Clifton,* 30 S. D. 127, 137 N. W. 585, the Court held that:

> "One who knows the facts rendering a tax invalid must not only protest, but must wait until active steps to enforce payment are taken before he pays the tax. Any other payment is voluntary."

See, also, cases cited in 64 A. L. R., pp. 12-14. In the principal case the complainant did wait until March 28th, but he could wait no longer, for respondents took no steps toward enforcing payment and the mere delay was causing complainant irreparable injury.

It has been repeatedly held that mere threats on the part of the tax collector to levy a distress upon the property of the taxpayer do not constitute such imminent duress as to make a payment involuntary. In 48 A. L. R. at page 1387, the following summary of the decisions is made:

> "It has been held that a payment made because of a threat to sell one's property or to interfere with his business for failure to do so, in the absence of any force, is voluntary, and that, under such circumstances, there can be no recovery although the statute imposing the tax is unconstitutional. San Francisco & N. P. R. Co. v. Dinwiddie (1882), 8 Sawy. 312, 13 F. 789; Board of Education v. Toennigs (1921), 279 Ill. 469, 130 N. E. 758; Detroit v. Martin (1876), 34 Mich. 170, 22 Am. Rep. 512; C. & J. Michel Brewing Co. v. State (1905), 19 S. D. 302, 70 L. R. A. 911, 103 N. W. 40."

In *Board of Education v. Toennigs*, 279 Ill. 469, 130 N. E. 758, the tax collector had notified taxpayers that their property would be sold if they did not pay. It was held that this threat did not make the payments involuntary from a legal standpoint. And in *Canfield Salt & Lumber Co. v. Township of Manistee*, 120 Mich. 466, 59 N. W. 164, where the tax collector had made a formal levy and advertised the personal property of the plaintiff for sale, but there had been no attempted or threatened removal of the property, the Court said:

> "It cannot be said that any immediate or urgent necessity existed for the payment."

The case of *Lyon v. Tax Receiver,* 52 Mich. 271, 17 N. W. 839, was distinguished, for there the collector had been in actual possession and had threatened to take the goods away unless payment were made. In *Johnson v. Crook County,* 53 Ore. 329, 100 P. 294, the complaint averred that the sheriff, in obedience to a warrant attached to the roll, notified plaintiff that the exaction was just and due and that unless the sum demanded was paid he would "in due time" collect it by a sale of the property. The court said:

> "It is nowhere alleged that the sheriff was either in the act of selling the land, or that he threatened immediately to do so; or that the plaintiff, believing that the menace would be instantly executed, was by the abrupt urgency ensnared into meeting the payment. . . ."

It was held that a demurrer for insufficiency was properly sustained.

Even if counsel should urge that at the time respondent treasurer threatened to seize all motor vehicles upon which the tax had not been paid, as alleged in the Bill of Complaint, such threat constituted imminent duress, rendering any payment involuntary, it could hardly be said that the coercion remained imminent on March 28th, one month after the tax became delinquent. In 64 A. L. R. at page 36, the annotator says:

> "It may be stated as a general rule that, in order for a payment of taxes to be involuntary, it must be made while the duress or coercion is in effect, and that a payment made before such duress or coercion arises, or after it has been removed or continues to exist, is not an involuntary payment within the meaning of the law."

In *Eslow v. Albion,* 153 Mich. 720, 117 N. W. 328, a direct personal threat to have the taxpayer arrested unless he paid a license tax by a certain hour the next

day was held not to render involuntary a payment after the time mentioned in the threat.

Thus it appears that the common-law legal remedy of the complainant not only was doubtful, but was, in fact, non-existent. Under such circumstances the equitable jurisdiction of the court was properly invoked.

VI.

Distinction in the Mana Transportation Company Case.

The Bill of Complaint in the Mana Transportation Company case alleges that the automobiles of that complainant were actually in use upon the public highways. The only possible difference between the two cases is a jurisdictional one. Should this Honorable Court hold the tax to be unconstitutional in the Kitagawa case, it would follow that the tax could not be collected from the Mana Transportation Company, Ltd. The cases above cited in support of the equitable jurisdiction of the trial court in the Kitagawa case apply equally to the Mana Transportation Company case.

It is solicited that the decree of the lower court be reversed and the case remanded for entry of a decree granting the relief prayed for in the Bills of Complaint.

Respectfully submitted,

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